Subject Index

Table of Authorities Cited

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. .....

SIX COMPANIES OF CALIFORNIA, a corporation, and HARTFORD ACCIDENT AND INDEMNITY COMPANY, a corporation, FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a corporation, THE AETNA CASUALTY AND SURETY COMPANY, a corporation, INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, a corporation, AMERICAN SURETY COMPANY OF NEW YORK, a corporation, MARYLAND CASUALTY COMPANY, a corporation, UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation, THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, a corporation, GLEN FALLS INDEMNITY COMPANY, a corporation, STANDARD SURETY AND CASUALTY COMPANY OF NEW YORK, a corporation, STANDARD ACCIDENT INSURANCE COMPANY, a corporation, MASSACHUSETTS BONDING AND INSURANCE COMPANY, a corporation, CONTINENTAL CASUALTY COMPANY, a corporation, and NEW AMSTERDAM CASUALTY COMPANY, a corporation,

Petitioners,

vs.

JOINT HIGHWAY DISTRICT NO. 13 OF THE STATE OF CALIFORNIA, a public corporation,

Respondent.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Six Companies of California, and Hartford Accident and Indemnity Company, Fidelity and Deposit Company of Maryland, The Aetna Casualty and Surety Company, Indemnity Insurance Company of North America, American Surety Company of New York, Maryland Casualty Company, United States Fidelity and Guaranty Company, The Fidelity and Casualty Company of New York, Glen Falls Indemnity Company, Standard Surety and Casualty Company of New York, Standard Accident Insurance Company, Massachusetts Bonding and Insurance Company, Continental Casualty Company and New Amsterdam Casualty Company, respectfully show:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Two questions are presented by this petition:

The first question is whether a California rule of law, declared by its District Court of Appeal in a decision which the California Supreme Court refused to review, which decides that a clause in a construction contract providing for liquidated damages for delay in completion of the contract work does not apply after the contractor abandons the contract, is a rule of law which is binding on the courts of the United

States in an action arising in California and subject to its laws.

A second question is also presented as to whether *any* liquidated damages can be recovered in the present case (regardless of the answer to the first question) because sections 1670-71 of the California Civil Code declare provisions in a contract for such damages void unless "from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage". In this case such impracticability or extreme difficulty did not exist.

Petitioner Six Companies of California, as contractor, (hereinafter called "contractor" to distinguish it from the other petitioners which were sureties on a bond given by contractor) contracted with respondent Joint Highway District No. 13 of the State of California for the construction of a highway project including two parallel tunnels commonly known as the Broadway Tunnel near Oakland, in Alameda and Contra Costa Counties, California. After part performance, contractor, asserting that respondent had breached the contract, served notice of rescission and stopped work. Contractor thereafter brought suit against respondent in the District Court of the United States for the Northern District of California for the reasonable value of materials and labor furnished. Respondent answered alleging a wrongful abandonment of the contract and cross-complained for damages against the contractor and its sureties, including damages for delay in the amount of $206,500.00 (R. 58).

The claim of respondent for damages for delay was based solely on a contract clause providing that contractor would pay to respondent $500.00 per day for each day after May 24, 1936, until the work was actually completed (R. 53-57). Respondent neither pleaded nor attempted to prove it had sustained any actual damage from any delay.

The District Court found against petitioners on all issues raised by both the complaint and cross-complaint. It found that the contractor had wrongfully abandoned the work on June 13, 1936 (R. 155) and was not entitled to judgment on the complaint (R. 216). It found that the time when the contractor was required to complete the work under the contract expired on May 24, 1936, that there was a delay of twenty days beyond that date prior to abandonment of the contract on June 13, 1936, and the following delays after abandonment:

1. A delay of 149 days after abandonment before new contracts were let by respondent for doing the work.
2. A delay of 264 days after the first new contract was let before the work was completed (Finding of Fact XXIII R. 199-201).

The District Court concluded that respondent was entitled to judgment on its cross-complaint including judgment for liquidated damages for delay in the amount of $142,000.00, being damages at the stipulated contract rate of $500.00 per day for 20 days'

delay prior to abandonment and 264 days' delay after abandonment.

On September 27, 1938, in conformity with the conclusions of the District Court a judgment was entered by that Court against the contractor on the complaint and in favor of respondent and against all the petitioners on the cross-complaint. There was included in the judgment in favor of respondent on the cross-complaint the above mentioned amount of $142,000.00 as liquidated damages for delay (R. 309).

On November 25, 1938, petitioners appealed the judgment of the said District Court to the United States Circuit Court of Appeals for the Ninth Circuit which on March 14, 1940, affirmed the judgment (R. 2634). Petitioners thereafter filed a petition for rehearing which was denied on April 25, 1940 (R. 2635).

Petitioners here seek to review only that part of the judgment of the Circuit Court of Appeals which affirms the judgment of the District Court awarding to respondent liquidated damages for delay in the amount of $142,000.00.

The Circuit Court of Appeals affirmed that part of the judgment on the cross-complaint on the grounds,

(a) that the provision in the contract for liquidated damages for delay was applicable to delay after abandonment, and in so holding refused to be bound by or to follow a decision to the contrary by the District Court of Appeal of the State of California (*Sinnott v. Schumacher*, (1919) 45 Cal.

App. 46, 187 Pac. 105). In so holding the Circuit Court of Appeals conceded that its decision was adverse to that of the District Court of Appeal (R. 2629) but held that such decision was not binding on it because it was not a decision by the Supreme Court of California, and

(b) that such provision was valid notwithstanding sections 1670 and 1671 of the California Civil Code even though the respondent in its corporate capacity suffered no actual damages from delay which were impracticable or extremely difficult to fix.

B.

JURISDICTION.

1. The jurisdiction of the Supreme Court of the United States to issue the writ of certiorari herein prayed for is invoked under Judicial Code, Section 240 (a), as amended by the Act of February 13, 1925, 43 Stat. 938 (28 U. S. C., Section 347 (a)).

2. The judgment which is sought to be reviewed was entered by the United States Circuit Court of Appeals for the Ninth Circuit on March 14, 1940. A petition by petitioners for a rehearing (filed within the time allowed by the rules of said Circuit Court of Appeals) was denied on April 25, 1940 (R. 2635).

3. The petitioners claim that, under and by virtue of the local law of California, as established by its Courts, provisions in construction contracts for liqui-

dated damages for delay have no application to delay subsequent to abandonment and that, under and by virtue of the local law of California, as established by the statutes thereof, such provisions are void unless there are actual damages to a party to the contract which it would be impracticable or extremely difficult to fix and that the record shows conclusively that there were no such damages. On both of these grounds petitioners claim that the part of the judgment of the Circuit Court of Appeals affirming the judgment of the District Court against them on the cross-complaint for liquidated damages for delay is erroneous.

4. Petitions for writs of certiorari to review decisions of the United States Circuit Courts of Appeals which have failed to follow the laws of the several States have been heretofore granted by this Court. *Erie Railroad Co. v. Hilt* (1918) 247 U. S. 97, 38 S. Ct. 435, 62 L. Ed. 1003; *Fidelity Union Trust Company v. Field* (1940) 60 S. Ct. 890, Preliminary print official reports Vol. 309, No. 2, p. IV. (Petition in the last cited case for Writ of Certiorari to Circuit Court of Appeals for the Third Circuit was granted by the Supreme Court April 22, 1940.)

C.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The decision of the United States Circuit Court of Appeals for the Ninth Circuit in refusing to be bound by or to follow the decision of the District

Court of Appeal of California in the case of *Sinnott v. Schumacher* (1919) 45 Cal. App. 46, 187 Pac. 105, is in conflict with Section 34 of the Judiciary Act of 1789, now found in the Judicial Act in 28 U. S. C., Section 725, as construed by the case of *Erie Railroad Co. v. Tompkins* (1938) 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188.

2. The decision of the United States Circuit Court of Appeals for the Ninth Circuit, in refusing to be bound by or to follow the decision of a District Court of Appeal of California is in conflict with the decision of the United States Supreme Court in the case of *Rindge Company v. County of Los Angeles* (1923) 262 U. S. 700, 43 S. Ct. 689, 67 L. Ed. 1186. In that case, the United States Supreme Court held it was controlled so far as state law was concerned by a decision of a District Court of Appeal of California. It is also in conflict with the opinion rendered by the United States Supreme Court in *Tipton v. Atchison, Topeka & Santa Fe Railway Co.* (1936) 298 U. S. 141, 56 S. Ct. 715, 80 L. Ed. 1091.

3. The decision of the United States Circuit Court of Appeals in passing upon the validity of the clause of the contract providing for liquidated damages followed the general rule of law and not the California rule as set forth in the statutes of this State (Sections 1670 and 1671 of the California Civil Code) and for that further reason is in conflict with the decision of this Court in *Erie Railroad Co. v. Tompkins*, supra. (Said code sections are quoted in full in the following brief).

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a transcript of the record and proceedings herein; and that that part of the judgment of the United States District Court for the Northern District of California on the cross-complaint which awards to respondent $142,000.00 liquidated damages for delay and that part of the order and judgment of the United States Circuit Court of Appeals for the Ninth Circuit affirming such part of said judgment of said District Court be reversed by this Honorable Court, and your petitioners have such other and further relief in the premises as to this Honorable Court may seem meet and just.

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SIX COMPANIES OF CALIFORNIA, a corporation, and HARTFORD ACCIDENT AND INDEMNITY COMPANY, a corporation, FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a corporation, THE AETNA CASUALTY AND SURETY COMPANY, a corporation, INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, a corporation, AMERICAN SURETY COMPANY OF NEW YORK, a corporation, MARYLAND CASUALTY COMPANY, a corporation, UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation, THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, a corporation, GLEN FALLS INDEMNITY COMPANY, a corporation, STANDARD SURETY AND CASUALTY COMPANY OF NEW YORK, a corporation, STANDARD ACCIDENT INSURANCE COMPANY, a corporation, MASSACHUSETTS BONDING AND INSURANCE COMPANY, a corporation, CONTINENTAL CASUALTY COMPANY, a corporation, and NEW AMSTERDAM CASUALTY COMPANY, a corporation,

Petitioners,

vs.

JOINT HIGHWAY DISTRICT NO. 13 OF THE STATE OF CALIFORNIA, a public corporation,

Respondent.

Brief in Support of Petition for Writ of Certiorari.

I.

OPINIONS OF THE COURTS BELOW.

The opinion of the District Court was rendered April 8, 1938, and was reported under the title of Six Companies of California v. Joint Highway District No. 13 of the State of California in 24 Fed. Supp. 346. The opinion of the Circuit Court of Appeals was rendered March 14, 1940, and was reported under the same title in 110 F. (2d) 620, and is set forth in full in the record (R. 2616).

II.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

A full statement of these grounds has heretofore been given under heading B in the petition, and in the interest of brevity the statement will not be repeated in this brief.

III.

STATEMENT OF THE CASE.

As stated in the petition, we are requesting this Court to reverse only that part of the judgments rendered by the Courts below which awarded to respondent on its cross-complaint liquidated damages for delay. For that reason we shall confine this statement to those facts which are pertinent to a review of that question.

Under the limited review requested we are not questioning the correctness of the conclusion of the Courts below that petitioner Six Companies of California (hereinafter called contractor) abandoned, on June 13, 1936, without sufficient justification, its contract with respondent for the construction of a highway and highway tunnels. We accept as correct for the purposes of this petition, the findings of fact of the District Court that the time for completion of the work under the contract, as provided in that document, expired on May 24, 1936 (Finding XXXIII, R. 199) and that the reasonable time for completion of the work after respondent relet it to others was 264 days (R. 200).

The cross-complaint of respondent (R. 46) against petitioners claimed damages for its cost of measuring and reletting the work (R. 50-52) and the excess cost over the contract price of completing the work (R. 52-53). Judgment was entered in favor of respondent on both these items and that part of the judgment is not questioned here.

In addition, the cross-complaint claimed damages of $206,500.00 from delay, basing that claim on the following provision of the contract:

> "(d) Damages for Delay.—The parties hereto expressly stipulate and agree that time is the essence of this contract. In case the work is not completed within the time specified in the contract or within such extensions of the contract time as may be allowed as herein provided, it is distinctly understood and agreed that the Con-

tractor shall pay the District as agreed and liquidated damages and not as a penalty five hundred dollars ($500.00) for each and every working day which may elapse between the limiting date as herein provided and the date of actual completion of the work, said sum being specifically agreed upon as a measure of damage to the District by reason of delay in the completion of the work; it being expressly stipulated and agreed that it would be impracticable to estimate and ascertain the actual damages sustained by the District under such circumstances; and the Contractor agrees and consents that the amount of such liquidated damages so fixed, shall be deducted and retained by the District from any money then due, or thereafter to become due, the Contractor." (R. Volume VIII, Book of Exhibits, p. 9).

The cross-complaint neither alleged nor asked any actual damages from delay, but the part thereof claiming damages from delay was based entirely on the quoted provision in the contract for liquidated damages (R. 53-58).

The Circuit Court of Appeals, as stated in the petition, refused to be bound by and follow a decision of the District Court of Appeal of California, admittedly contrary to the decision of the Circuit Court of Appeals (R. 2629), holding such provisions inapplicable after abandonment. Had the Circuit Court of Appeals applied the law of California as decided by the District Court of Appeal, the judgment for liquidated damages would have been only $10,000.00 instead of $142,000.00.

In an effort to comply with the California rule, as expressed in sections 1670 and 1671 of the California Civil Code and the decisions of the Courts of that State that one seeking to enforce such a provision must both plead and prove facts showing that "from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage", respondent alleged in its cross-complaint three items of damage from delay which it claimed established this. They were:

1. Damage to the public (R. 55, 56);
2. Cost of maintaining defendant's staff and organization (R. 57);
3. Interest on its bonds (R. 57).

The District Court found in accordance with these allegations of the cross-complaint (R. 202), concluded that respondent was entitled to a judgment for $142,000.00 liquidated damages (R. 217) and included that amount of such damages in the judgment rendered (R. 310).

The Circuit Court of Appeals sustained the contractual provision on the sole ground that respondent had proved that there would be damage from delay to taxpayers who were residents of respondent—though not to respondent itself—great in extent but impracticable of ascertainment and that respondent, a municipal corporation, could, for that reason, enforce the provision (R. 2624-2626). In so holding the Circuit Court of Appeals applied a rule of general law pre-

vailing in other jurisdictions but contrary to the express provisions of California statutes (Civil Code Sections 1670-1671).

IV.

SPECIFICATION OF ERRORS.

A. The United States Circuit Court of Appeals for the Ninth Circuit erred in holding it is not bound to follow the decision of the District Court of Appeal of California rendered in the case of *Sinnott v. Schumacher* (1919) 45 Cal. App. 46, 187 Pac. 105, that provisions for liquidated damages in construction contracts are inapplicable after abandonment.

B. The United States Circuit Court of Appeals for the Ninth Circuit erred in holding that the decision of the District Court of Appeal of California in *Sinnott v. Schumacher,* supra, did not establish the law of the State of California on the point in issue.

C. The United States Circuit Court of Appeals for the Ninth Circuit erred in substituting its opinion for the opinion of the District Court of Appeal of California as to what the law of California is on the point in issue.

D. The decision of the United States Circuit Court of Appeals for the Ninth Circuit, in refusing to follow the decision of a District Court of Appeal of California, is in conflict with Section 34 of the Judiciary Act of 1789, now found in the Judicial Act in 28 U. S. C., Section 725, as construed by the cases of

Erie Railroad Co. v. Tompkins (1938) 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, and *Ruhlin v. New York Life Insurance Co.* (1938) 304 U. S. 202, 58 S. Ct. 860, 82 L. Ed. 1290.

E. The decision of the United States Circuit Court of Appeals for the Ninth Circuit, in refusing to follow the decision of a District Court of Appeal of California, is in conflict with prior decisions of this Court in *Tipton v. Atchison, Topeka & Santa Fe Railway Co.* (1936) 298 U. S. 141, 56 S. Ct. 715, 80 L. Ed. 1091, and *Rindge Company v. County of Los Angeles* (1923) 262 U. S. 700, 43 S. Ct. 689, 67 L. Ed. 1186.

F. The decision of the United States Circuit Court of Appeals for the Ninth Circuit is in conflict with sections 1670 and 1671 of the Civil Code of California.

V.

ARGUMENT.

SUMMARY OF THE ARGUMENT.

Point A. The Circuit Court of Appeals erred in holding that it is not bound to follow the decision of the District Court of Appeal of California in the case of *Sinnott v. Schumacher* (1919) 45 Cal. App. 46, 187 Pac. 105.

The jurisdiction of the District Courts of Appeal of California is State-wide.

This Court has decided that the Courts of the United States sitting in California are bound by de-

cisions of the California District Courts of Appeal where the Supreme Court of California has denied a rehearing after decision of such Courts.

Point B. The Circuit Court of Appeals erred in holding that the stipulation in the contract for liquidated damages was valid under the law of California.

POINT A.

THE CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT IT IS NOT BOUND TO FOLLOW THE DECISION OF THE DISTRICT COURT OF APPEAL OF CALIFORNIA IN THE CASE OF SINNOTT v. SCHUMACHER, (1919) 45 Cal. App. 46, 187 Pac. 105.

The Circuit Court of Appeals in its opinion herein conceded that the District Court of Appeal of California had decided in *Sinnott v. Schumacher,* supra, that a liquidated damage provision in a construction contract applies only to delay while the contractor is performing the work under the contract and has no application after the contractor has abandoned the work and that the damages from delay, if any, recoverable in such case are the actual damages and not the liquidated amount (R. 2629).

It held, however, that it was not bound by that decision and that, with respect to decisions of the California District Courts of Appeal, it was in the same position as the California Supreme Court and could apply the law of California as it construed it regardless of District Court of Appeal decisions (R. 2629-2630).

We think that in so holding the Circuit Court of Appeals fell into error and misconstrued the decision of this Court in *Erie Railroad Co. v. Tompkins* (1938) 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188.

It took the view that the *Erie Railroad Co.* case holds that Courts of the United States are bound only by the decisions of state courts of last resort. But this overlooks what we believe is the fundamental basis of the decision. As this Court said in the *Erie* case, at page 78:

> "Except in matters governed by the Federal Constitution or by Acts of Congress the law to be applied in any case is the law of the State."

The question involved then is—What is the law of California? It seems to us, under the reasoning of the *Erie Railroad Co.* case that it makes little difference what state court has declared the law so long as it is the rule of decision in the state. It is true that in the *Erie* case this Court referred to the law of the state as declared by its highest court in a decision. But it did not say that the law of the state might not be established by the decision of an intermediate appellate court and where the decision of such court does in fact announce a rule of law which other state courts are bound to follow it establishes the law of the state even though another court of the state has the power to overrule its decision.

In *Ruhlin v. New York Life Insurance Co.* (1938) 304 U. S. 202, 58 S. Ct. 860, 82 L. Ed. 1290, this Court said, at pages 208, 209:

"Application of the 'State law' to the present case, or any other controversy controlled by *Erie R. Co. v. Tompkins,* does not present the disputants with duties difficult or strange. The parties and the federal courts must now search for and apply the entire body of substantive law governing an identical action in the state courts. Hitherto, even in what were termed matters of 'general' law, counsel had to investigate the enactments of the state legislature. Now they must merely broaden their inquiry to include the *decisions of the state courts, just as they would in a case tried in the state court,* and just as they have always done in actions brought in the federal courts involving what were known as matters of 'local' law." (Emphasis ours.)

Had this case been tried in any superior (trial) court of California, such court would have been bound by the decision in *Sinnott v. Schumacher,* and the result would have been the opposite of that announced by the Circuit Court of Appeals. If, therefore, as this Court says in the *Ruhlin* case, the state law is to be determined just as it would in a case tried in the state courts we cannot escape the conclusion that the decisions of the California District Courts of Appeal are binding on the federal courts.

The power of the Supreme Court of California to overrule decisions of the District Courts of Appeal has little bearing on the solution of the problem. The Supreme Court has the power to overrule its own decisions, but its prior decisions, as well as prior decisions of the District Courts of Appeal, are the law of the state unless and until overruled. It is not un-

usual for courts of last resort to overrule earlier decisions, but until they do so the earlier decision must be followed by inferior courts.

The Decision of One District Court of Appeal in California Binds the Others, Particularly When a Petition for Hearing by the Supreme Court of the Earlier Case Has Been Denied.

The opinion of the Circuit Court of Appeals in this case states, in discussing the question of whether the decision of one District Court of Appeal is binding on another:

> "* * * While there is conflict in these courts, whether the decision of one is binding on another, *Skaggs v. Taylor,* 77 Cal. App. 519, *Clover v. Jackson,* 81 Cal. App. 55, the most recent case holds that one District Court of Appeal is not bound by the decision of another. *People v. Brownell,* 2 Cal. App. (2d) 287." (R. 2629)

We must respectfully differ from this statement. In addition to *Skaggs v. Taylor* and *Clover v. Jackson,* cited in the above quotation, all of the following cases hold that the District Courts of Appeal of one district are bound by prior decisions of such courts in another district, where the Supreme Court has denied a hearing in the prior case.

Bridges v. Fisk (1921) 53 Cal. App. 117, 122, 200 Pac. 71;

People v. Whitaker (1924) 68 Cal. App. 7, 11, 228 Pac. 376;

Masonic Mines Association v. Superior Court (1934) 136 Cal. App. 298, 300, 28 Pac. (2d) 691.

People v. Brunwin (1934) 2 Cal. App. (2d) 287, 37 Pac. (2d) 1072 (cited in the quotation from the opinion as *People v. Brownell*) states no different rule. In that case, as the court points out in its opinion at page 294, the Supreme Court in *People v. Rabe* (1927) 202 Cal. 409, 261 Pac. 303, had previously disapproved the ruling in the prior decision of the District Court of Appeal upon which reliance was placed. Upon such disapproval it, of course, ceased to be authority.

As the District Courts of Appeal of one district are bound by the decisions of the same courts in their own and other districts, such decisions are of state-wide scope and application. A rule of law announced in one district will be followed in all others and, of course, must be followed by all trial courts.

Does not, therefore, the decision of the Court in the instant case perpetuate the evils condemned in *Erie Railroad Co. v. Tompkins,* supra? There are many propositions of state law in California which have never been decided by its Supreme Court but which have been decided by a District Court of Appeal on which the Supreme Court has denied a hearing. These decisions of the District Courts of Appeal are accepted as the law throughout the state and the rules announced by them are applied in litigation in its courts. Many of the rules of law announced by the District Courts of Appeal of the state have never been decided by its Supreme Court and probably never will be, because under the enlarged jurisdiction conferred upon the District Courts of Appeal by the 1928 amendment to Article VI, section 4, of

the California Constitution most appeals are taken directly to these courts and it is very unlikely that the Supreme Court would order any case in which it believes the District Courts of Appeal have properly applied the law to be transferred to it for hearing. We earnestly contend that the decisions of these courts are the law of the state when there is no decision of the Supreme Court which conflicts with them. If the federal courts refuse to follow them we may have, for long and indefinite periods of time, one rule in the federal courts and another in the state courts, a condition substantially the same as that brought about by the rule announced in *Swift v. Tyson,* 16 Pet. 1.

Sinnott v. Schumacher, supra, was a case in which the appeal was properly taken in the first instance to the Supreme Court and was then transferred by the Supreme Court to the District Court of Appeal for hearing. Under such circumstances, the denial by the Supreme Court of a hearing after decision by the District Court of Appeal meant that the Supreme Court considered the decision correct upon the case shown by the record and not simply that no error appeared upon the face of the opinion of the District Court of Appeal, as would be the situation if the case had been in the appellate jurisdiction of the District Court of Appeal and if the judgment had been appealed directly to that court.

This distinction was clearly stated by the Supreme Court of California in denying a rehearing in the

case of *Burke v. Maze* (1909) 10 Cal. App. 206, 101 Pac. 438.

We quote from the decision of the Supreme Court appearing at pages 211 and 212 of the appellate reports:

> "The petition for a rehearing of this cause in the supreme court, after judgment in the district court of appeal, is denied. It is a cause which, under the recent amendment to article VI of the constitution, went properly by direct appeal to the district court for the first district. In such cases a rehearing in this court is granted only when error appears upon the face of the opinion of the appellate court, or when a doubtful and important question is presented upon which we desire to hear further argument. In such cases the denial of a petition for a rehearing would or might establish a mischievous precedent, and for that reason alone we feel obliged to review the decision of a cause which is not within our jurisdiction by direct appeal. In causes properly appealed to this court and referred by us to the district court for hearing and decision the rule as to rehearings is different; for if it is contended that the case stated in the opinion of the district court of appeal differs materially from the case as it appears in the record, we feel bound to look into the record to see whether anything deserving consideration has been overlooked in deciding the cause, or any of the facts misconceived in material particulars. If so we order a rehearing notwithstanding the opinion of the district court may be correct on its face, because the complaining

party has a right to the opinion of this court upon the precise case shown by the record."

The rule announced by *Burke v. Maze* has never been departed from in California. It must, therefore, be assumed that before denying a hearing in *Sinnott v. Schumacher,* supra, the Supreme Court reviewed the record and was satisfied that all the points involved were correctly decided.

In *Eisenberg v. Superior Court* (1924) 193 Cal. 575, 578, 226 Pac. 617, the court said:

> "* * * The order of this court denying a petition for a transfer to this court after said decision of the district court of appeal may be taken as an approval of the conclusion there reached, but not necessarily of all of the reasoning contained in that opinion."

It is the *conclusion* reached in *Sinnott v. Schumacher* upon which we rely here and under the rule announced by the California Supreme Court in the *Eisenberg* case that conclusion was approved by the Supreme Court of the state.

The Jurisdiction of the District Courts of Appeal is State-Wide.

While it is true, as stated in the opinion of the Circuit Court of Appeals, that California is divided into four districts in each of which sits a District Court of Appeal, the jurisdiction of those courts is not limited to the consideration of appeals from trial courts of the district in which they sit.

Article VI, section 4b, of the California constitution, in defining the jurisdiction of the District Courts of Appeal, states:

> "The district courts of appeal shall have appellate jurisdiction on appeal from the superior courts (except in cases in which appellate jurisdiction is given to the supreme court) in all cases at law in which the superior courts are given original jurisdiction. * * *"

It is to be noted that their jurisdiction is not confined to appeals from superior (trial) courts *in their respective districts.* They are given jurisdiction to hear appeals from *any superior court in the state* whether situated in their district or not and, as pointed out hereinafter, they frequently hear and decide appeals from superior courts in other districts which are transferred by the Supreme Court from one District Court to another.

They also have jurisdiction to hear and decide any case, even though originally appealable to the Supreme Court, which is transferred to them for decision. We quote further from Article VI, section 4b, of the California Constitution:

> "The said courts shall also have appellate jurisdiction in all cases, matters, and proceedings pending before the supreme court which shall be ordered by the supreme court to be transferred to a district court of appeal for hearing and decision." (The full text of Article VI, sections 4, 4a, 4b and 4c of the California Constitution defining the jurisdiction of the Supreme Court and

District Courts of Appeal of California is set forth in the appendix.)

Article VI, section 4c, of the same constitution, provides as follows:

> "§4c. *Transfer of cases between supreme and appellate courts.* The supreme court shall have power to order any cause pending before the supreme court to be heard and determined by a district court of appeal, and to order any cause pending before a district court of appeal to be heard and determined by the supreme court. The order last mentioned may be made before judgment has been pronounced by a district court of appeal, or within fifteen days in criminal cases, or thirty days in all other cases, after such judgment shall have become final therein. The judgment of the district courts of appeal shall become final therein upon the expiration of fifteen days in criminal cases, or thirty days in all other cases, after the same shall have been pronounced.
>
> "The supreme court shall have power to order causes pending before a district court of appeal for one district to be transferred to the district court of appeal for another district, or from one division thereof to another, for hearing and decision."

Article VI, section 4, of the state constitution contained almost identical provisions at the time *Sinnott v. Schumacher* was tried and appealed.

Under the authority thus conferred on it by the state constitution the California Supreme Court may,

and frequently does, transfer cases pending before it to the District Courts of Appeal and transfer cases pending before one District Court of Appeal to a District Court of Appeal for another district. The District Court of Appeal to which a case is so transferred has jurisdiction to hear and decide it even though it may be on appeal from the decision of a superior court in an entirely different district.

We have listed in the appendix a few of the cases in the District Courts of Appeal where those appellate courts have decided appeals from trial courts in other districts and have printed therein an excerpt from the seventh report of the Judicial Council of California showing the frequency of this practice in California.

It is clear that those courts have jurisdiction of appeals from any superior court in the state and that their jurisdiction is not limited to hearing appeals from superior courts in their own districts.

This Court Has Decided That the Courts of the United States Sitting in California Are Bound by Decisions of the California District Courts of Appeal Where the Supreme Court of California Has Denied a Rehearing After Decision of Such Courts.

In *Tipton v. Atchison, Topeka & Santa Fe Railway Co.* (1936) 298 U. S. 141, 56 S. Ct. 715, 80 L. Ed. 1091, this Court considered the question of whether the federal courts were bound to follow two decisions of the California District Courts of Appeal. While

it held they were not because the decisions were based on an erroneous conception of federal statutes, it said that they would have been if the state court decisions had been based on a construction of the California law.

The Court said, at page 149, of the decision of the Circuit Court of Appeals for the Ninth Circuit:

> "Whether this conclusion is right depends upon the force and effect of two District Court of Appeal decisions, which the Supreme Court of the State refused to review."

And, at page 151:

> "If these decisions of intermediate courts of appeal, and the refusal of the Supreme Court of California to review them, amount to no more than a judicial construction of the compensation act as having, by its terms, no application in the circumstances, they are binding authority in federal courts. * * *"

And, further, at page 152:

> "The Supreme Court of the State refused to review either of the cases although this court had recently defined the scope of the Safety Appliance Acts in the *Moore* and *Gilvary* cases. If we were convinced that the court acted solely upon a construction of the workmen's compensation law, uninfluenced by the decisions following the supposed authority of the *Rigsby* case, we should not hesitate to hold United States courts bound by such construction of the state statute. * * *"

It seems very clear from the foregoing that, so far as questions of state law are concerned, this Court considers decisions of the California District Courts of Appeal binding on the federal courts where the Supreme Court of California has denied a hearing.

See also *Ridge Company v. County of Los Angeles* (1923) 262 U. S. 700, 43 S. Ct. 689, 67 L. Ed. 1186, where the Court said, at page 708, of a decision of the California District Court of Appeal, on which the California Supreme Court had denied a hearing:

> "We necessarily accept, as a matter of state law, the holding of the District Court of Appeal that the proviso to §1241 of the Code made the resolutions of the Board of Supervisors conclusive evidence as to the necessity of taking these particular highways and the other matters therein specified. So construed it was held by that court not to be objectionable to any provision of the State or Federal Constitutions. *By this we are controlled so far as the provisions of the state constitution are concerned.*" (Emphasis ours.)

This Court has held that where the state court is an important tribunal its decisions should be followed.

Erie Railroad Co. v. Hilt (1918) 247 U. S. 97, 38 S. Ct. 435, 62 L. Ed. 1003.

This Court has granted certiorari to review a recent decision of the Circuit Court of Appeals for the third circuit which decided that it was not bound by a decision of the Court of Chancery of New Jersey be-

cause it was a court of original jurisdiction and not the highest state court.

> *Field v. Fidelity Union Trust Co.* (1939) (C. C. A. 3rd) 108 F. (2d) 531. Certiorari granted April 22, 1940, 60 Sup. Ct. 890, preliminary print official reports Vol. 309, No. 2, p. IV.

We respectfully urge that the federal courts are bound by the decisions of the District Courts of Appeal in California, for, as we have hereinbefore pointed out, jurisdiction of those courts is not limited to their own districts but is state-wide, and their decisions are binding on all courts of first instance and all intermediate appellate courts in the state. We think that this Court has already decided in the *Tipton* and *Rindge Company* cases, supra, that the federal courts are so bound, particularly where the California Supreme Court has refused a hearing after decision in the District Court of Appeal.

The Circuit Court of Appeals in this case, by its opinion herein, asserts that it has been substituted for the California Supreme Court as the appropriate court of appeal and in the performance of that function will regard the decision of an intermediate court of appeal as persuasive, but not controlling, citing as authority for the statement *Wichita Royalty Co. v. City National Bank of Wichita Falls* (1939) 306 U. S. 103, 59 S. Ct. 420, 83 L. Ed. 515 (R. 2629-30).

The *Wichita* case is not, in our opinion, authority for the proposition for which it has been cited. That case was first tried in the state court and appealed to the Texas Supreme Court which reversed and remanded the cause for a new trial and stated the applicable principles of law for guidance of the trial court. After the cause was remanded, it was removed to the federal District Court and after trial there was appealed to the Circuit Court of Appeals. In denying a petition for rehearing after the decision of this Court in *Erie Railroad Co. v. Tompkins,* the Circuit Court of Appeals held that it was not obligated to follow the earlier decision of the Supreme Court of Texas because it thought a later decision of the Supreme Court of that state had modified the rule announced in the earlier state court decision.

The statement in the opinion of the Circuit Court of Appeals in this case is apparently based upon the following language in the opinion in the *Wichita* case, at page 107:

> "In departing from the 'law of the case,' as announced by the state court, and applying a different rule, the court below correctly stated that *by reason of the removal* it had been substituted for the Texas Supreme Court as the appropriate court of appeal and that it was its duty to apply the Texas law as the Texas court would have declared and applied it on a second appeal if the cause *had not been removed.* It was the duty of the federal court to apply the law of Texas as declared by its highest court." (Emphasis ours.)

It was only *because the case had been removed* to the federal courts that the Circuit Court of Appeals was substituted as the court of appeal. If we correctly interpret that decision this Court was commenting only upon the unusual situation which had arisen in that case. It was not announcing any rule that the Circuit Courts of Appeals generally are in the position of the state courts of last resort and free, therefore, to overrule, or disregard decisions of lower state courts because it disagrees with them and thinks the highest state courts would have done so.

This Court further held that the Circuit Court of Appeals was in error in holding that the later decision of the Supreme Court of Texas had modified the earlier. It said at page 110:

> "We think that the opinion of the Supreme Court of Texas in the present case has not been modified by the *Quanah* case and must be accepted as stating the law of Texas; and that it affords the appropriate guide for the District Court so far as it may be applicable to the facts which have been developed on the trial there."

It seems very clear to us from what was actually decided in that case that this Court did not consider the Circuit Court of Appeals a court of coordinate power with the state Supreme Court in deciding what the state law might be. The question of the power of the federal courts to disregard decisions of lower state courts was not at all involved. As the Court said, at page 107:

"* * * the only question for our decision is whether the Court of Appeals rightly concluded that the state court had thus altered its opinion."

We submit that the case is not authority for the broad proposition announced by the Circuit Court of Appeals in the instant case and that its decision is contrary to the principles there applied.

POINT B.

THE CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT THE STIPULATION IN THE CONTRACT FOR LIQUIDATED DAMAGES WAS VALID UNDER THE LAW OF CALIFORNIA.

The paragraph of the contract providing for liquidated damages has been quoted supra, pages 12 and 13.

The validity of agreements in contracts whereby the damages to be paid in the event of a breach are determined in anticipation thereof is regulated by statute in California.

Section 1670 of the California Civil Code provides as follows:

"Every contract by which the amount of damage to be paid, or other compensation to be made, for a breach of an obligation, is determined in anticipation thereof, is to that extent void, except as expressly provided in the next section."

Section 1671 of the California Civil Code provides as follows:

"The parties to a contract may agree therein upon an amount which shall be presumed to be

> the amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage."

The general rule in many states is that where the amount of liquidated damages fixed is reasonably related to actual damage the agreement will be sustained. This rule, however, is not applicable in California.

> *Moore v. Investment Properties Corporation* (1934) (C. C. A. 9th) 71 Fed. (2d) 711, 718.

Under the above quoted Code sections a party seeking to recover liquidated damages must plead and prove that from the nature of the case it would be impracticable or extremely difficult to fix the *actual damage.*

The Circuit Court of Appeals in this case recognizes and states this rule (R. 2624) and as we agree with this particular statement of that Court we shall not, in the interest of brevity, discuss it further.

As hereinbefore stated at page 14, respondent, in an effort to meet this burden, pleaded three items of damage from delay. They were (1) cost of continued operating overhead of respondent, (2) bond interest, and (3) loss to the general public.

The Circuit Court of Appeals rightly held (R. 2625) that it was neither impracticable nor extremely difficult to ascertain respondent's operating overhead and

that this item did not remove the clause in the contract from the ban of the statute.

That Court did not comment on the item of bond interest. All of respondent's bonds were issued in May, 1932, and were payable serially on specified dates and carried a fixed rate of interest which did not vary with the date of completion of the contract work (R. 2546-7). Delay in the completion of the project did not increase the obligations of respondent either as to principal or interest on its bonds. But, as in the case of the operating costs of respondent, the amount of interest payable on the bonds during any delay was easily capable of exact ascertainment and no such item of damage would support a provision in a contract for liquidated damages in California. It was a mere matter of arithmetical calculation.

The Circuit Court of Appeals held the clause of the contract for liquidated damages valid on the sole ground that delay in completion of the project would result in loss, not to respondent, but to resident taxpayers thereof. It cites (R. 2626) a number of cases from other jurisdictions in support of its decision on this point. As stated above, the general rule by which the validity of such clauses is measured in most of the states does not prevail in California. In that State the clause must meet the test prescribed by the statute. In relying upon and applying the rule of other jurisdictions having no statute similar to that of California the Court fell into error. It should have

decided the point with reference to the California rule, not the general rule.

The only California case cited by the Circuit Court of Appeals, *City of Oakland v. De Guarda* (1928) 95 Cal. App. 270, 272 Pac. 779, 273 Pac. 819, is very different from this. In that case the city recovered on a bond of a contractor who defaulted in the performance of a contract to improve a street. The work was being done under a statute whereby most of the cost of the work was assessed directly against the property owners. In a detailed analysis of the statute the court points out that the city was acting in the capacity of a trustee for the property owners and that the property owners were the persons beneficially interested in the performance of the work. Furthermore, it appeared that the damages were actual, definite and certain and that the persons who suffered them and the amount suffered by each could be definitely determined. In concluding its opinion, at page 286, the court states that the recovery by the city was for the use and benefit of the property owners and that it would be a wrongful act for the city to convert the money to its own use.

The cross-complaint in this case is not based upon any theory that respondent seeks recovery as a trustee. It asks for damages for its own use and benefit.

We have found no California case directly in point. However, the meaning of the statute seems perfectly clear from the mere reading of it. There must be

actual damage which it would be impracticable or extremely difficult to fix before the clause is valid. Actual damage to whom? Obviously to the parties, not to third persons. The statute is very restrictive, making every such stipulation void except such as comply with the stated exception and there is nothing in the exception which authorizes an agreement to pay liquidated damages to a *party thereto* because *others* may suffer damages from its breach which would be difficult to fix. It merely permits, in a defined case, the parties to agree upon the amount of damages to *them* from a breach and to substitute such agreed damages for actual damages. It does not authorize an agreement to pay liquidated damages where there are no actual damages.

Rispin v. Midnight Oil Co. (1923) (C. C. A. 9th) 291 Fed. 481, 484.

This clause of the contract (p. 12, supra) itself expressly states that the amount of $500.00 per day is "agreed upon as a measure of damage to the *District* (respondent) by reason of delay in completion of the work; it being expressly stipulated and agreed that it would be impracticable to estimate and ascertain the actual damages sustained by the *District* under such circumstances. * * *"

Thus by the very terms of the contract the liquidated damages are stated to be damages agreed upon in lieu of actual damages to one of the parties. The contractor made no promise to pay any such agreed

sum in lieu of damages which third parties might suffer from delay.

The clause was not inserted in this contract for the benefit of the resident taxpayers of respondent. They do not seek to recover on it and respondent has shown no damage to itself from delay in completion of the work which could not be easily and exactly determined. Its showing of speculative damage to the general public is, we submit, insufficient to entitle it to recover liquidated damages for delay under the rule in California that a party seeking such damages has the burden of proving that such party would suffer actual damages impracticable or extremely difficult to fix. The fact that the contract stipulates that there would be such damage is insufficient. It must be proved by independent facts.

Robert Marsh & Co., Inc., v. Tremper (1930) 210 Cal. 572, 576; 292 Pac. 950.

It is submitted that, in enforcing this clause and affirming the judgment for liquidated damages on the cross-complaint the Circuit Court of Appeals failed to apply the law of California as expressed in the statutes thereof and substituted a general rule, not applicable in California, in lieu thereof and, in so doing decided contrary to the rule announced by this Court in *Erie R. R. Co. v. Tompkins,* supra, and other cases, that the Courts of the United States are bound by the law of the states in which they sit whether expressed by their statutes or in decisions of their courts.

It is respectfully submitted that the writ should issue.

Dated: San Francisco, California, July 17, 1940.

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(APPENDIX FOLLOWS)

Appendix

Constitution of California, Article VI, Section 4:

"*Jurisdiction of supreme court and courts of appeal.* The supreme court shall have appellate jurisdiction on appeal from the superior courts in all cases in equity, except such as arise in municipal or justices' courts; also, in all cases at law which involve the title or possession of real estate, or the legality of any tax, impost, assessment, toll, or municipal fine also, in all such probate matters as may be provided by law; also, on questions of law alone, in all criminal cases where judgment of death has been rendered; the said court shall also have appellate jurisdiction in all cases, matters and proceedings pending before a district court of appeal, which shall be ordered by the supreme court to be transferred to itself for hearing and decision, as hereinafter provided. The said court shall also have power to issue writs of mandamus, certiorari, prohibition, and habeas corpus, and all other writs necessary or proper to the complete exercise of its appellate jurisdiction. Each of the justices shall have power to issue writs of habeas corpus to any part of the state, upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before himself or the supreme court or before any district court of appeal, or before any justice thereof, or before any superior court in the state, or before any judge thereof."

Constitution of California, Article VI, Section 4a:

"*Appellate districts.* The state is hereby divided into three appellate districts, in each of which there shall be a district court of appeal, consisting of such number of divisions having three justices each as the legislature shall determine; and until so determined otherwise, the courts of appeal for the first and second appellate districts shall each consist of two divisions, and the court of the third appellate district shall consist of one division.

"The legislature may from time to time create and establish additional district courts of appeal and divisions thereof and fix the places at which the regular sessions thereof shall be held and may provide for the maintenance and operation thereof. For that purpose the legislature may redivide the state into appellate districts, subject to the power of the supreme court to remove one or more counties from one appellate district to another as in this section provided.

"Each of such divisions shall have and exercise all of the powers of the district court of appeal.

"The district court of appeal as existing immediately prior to the approval and ratification of this amendment by the people shall not be affected thereby as to the officers or terms of office of the justices thereof.

"Upon the creation of any additional division of the district court of appeal the governor shall appoint three persons to serve as justices thereof until the first day of January after the next general elec-

tion. The justices of said division elected at such general election shall so classify themselves by lot that one of them shall go out of office at the end of four years, one of them at the end of eight years, and one of them at the end of twelve years, and entry of such classification shall be made in the minutes of said division, signed by the three justices thereof, and a duplicate thereof filed in the office of the secretary of state.

"The justices of the district courts of appeal shall be elected by the qualified electors within their respective districts at the general state elections except as provided in section 2¾ of article II; and the term of office of said justices shall be twelve years from and after the first day of January next succeeding their election.

"If any vacancy occur in the office of a justice of the district courts of appeal, the governor shall appoint a person to hold office until the election and qualification of a justice to fill the vacancy. Such election shall take place at the next succeeding general state or primary election after the first day of April next succeeding the occurrence of such vacancy; the justice then elected shall hold office for the unexpired term; provided, that whenever the term of office of the justice whose place is filled by appointment is fixed by law to expire on the first day of January after the next or such succeeding general election, then the person so appointed to fill the vacancy shall hold office for the remainder of such unexpired term.

"One of the justices of each of the district courts of appeal, and of each division of said courts, shall be the presiding justice thereof, and as such shall be appointed or elected, as the case may be.

"In cases wherein the presiding justice is not acting, the other justices shall designate one of their number to perform the duties and exercise the powers of presiding justice.

"The presence of two justices shall be necessary for the transaction of any business by such court except such as may be done at chambers, and the concurrence of two justices shall be necessary to pronounce a judgment.

"No appeal taken to the supreme court or to a district court of appeal shall be dismissed for the reason only that the same was not taken to the proper court, but the cause shall be transferred to the proper court upon such terms as to costs or otherwise as may be just, and shall be proceeded with therein as if regularly appealed thereto.

"All statutes now in force allowing, providing for or regulating appeals to the supreme court shall apply to appeals to the district courts of appeal so far as such statutes are not inconsistent with this article and until the legislature shall otherwise provide.

"The first district shall embrace the following counties: San Francisco, Marin, Contra Costa, Alameda, San Mateo, Santa Clara, Fresno, Santa Cruz, Monterey and San Benito.

"The second district shall embrace the following counties: Tulare, Kings, San Luis Obispo, Kern, Inyo, Santa Barbara, Ventura, Los Angeles, San Bernardino, Orange, Riverside, San Diego and Imperial.

"The third district shall embrace the following counties: Del Norte, Siskiyou, Modoc, Humboldt, Trinity, Shasta, Lassen, Tehama, Plumas, Mendocino, Lake, Colusa, Glenn, Butte, Sierra, Sutter, Yuba, Nevada, Sonoma, Napa, Yolo, Placer, Solano, Sacramento, El Dorado, San Joaquin, Amador, Calaveras, Stanislaus, Mariposa, Madera, Merced, Tuolumne, Alpine and Mono.

"The supreme court, by orders entered in its minutes, may from time to time remove one or more counties from one appellate district or another, but no county not contiguous to another county of a district shall be added to such district.

"Said district courts of appeal shall hold their regular sessions respectively at San Francisco, Los Angeles and Sacramento, and they shall always be open for the transaction of business."

(A fourth District was created by the California legislature in 1929, California Statutes 1929, p. 1202.)

Constitution of California, Article VI, Section 4b:

"*Jurisdiction of district courts of appeal.* The district courts of appeal shall have appellate jurisdiction on appeal from the superior courts (except in cases in which appellate jurisdiction is given to the supreme

court) in all cases at law in which the superior courts are given original jurisdiction; also, in all cases of forcible or unlawful entry or detainer (except such as arise in municipal, or in justices' or other inferior courts); in proceedings in insolvency; in actions to prevent or abate a nuisance; in proceedings of mandamus, certiorari, prohibition, usurpation of office, removal from office, contesting elections, eminent domain, and in such other special proceedings as may be provided by law; also, on questions of law alone, in all criminal cases prosecuted by indictment or information, except where judgment of death has been rendered.

"The said courts shall also have appellate jurisdiction in all cases, matters, and proceedings pending before the supreme court which shall be ordered by the supreme court to be transferred to a district court of appeal for hearing and decision. The said courts shall also have power to issue writs of mandamus, certiorari, prohibition and habeas corpus, and all other writs necessary or proper to the complete exercise of their appellate jurisdiction. Each of the justices thereof shall have power to issue writs of habeas corpus to any part of his appellate district upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before himself or the district court of appeal of his district, or before any superior court within his district, or before any judge thereof."

Constitution of California, Article VI, Section 4c:

"Transfer of cases between supreme and appellate courts. The supreme court shall have power to order any cause pending before the supreme court to be heard and determined by a district court of appeal, and to order any cause pending before a district court of appeal to be heard and determined by the supreme court. The order last mentioned may be made before judgment has been pronounced by a district court of appeal, or within fifteen days in criminal cases, or thirty days in all other cases, after such judgment shall have become final therein. The judgment of the district courts of appeal shall become final therein upon the expiration of fifteen days in criminal cases, or thirty days in all other cases, after the same shall have been pronounced.

"The supreme court shall have power to order causes pending before a district court of appeal for one district to be transferred to the district court of appeal for another district, or from one division thereof to another, for hearing and decision."

Cases Pending in the District Court of Appeal in One Appellate District and Transferred to Another Appellate District by Order of the Supreme Court.

Centrifugal National Concentrator Company v. Eccleston, 122 Cal. App. 698.

Pending in *Second* Appellate District.

Transferred to *Third* Appellate District.

City of Los Angeles v. Hall, 103 Cal. App. 460.

Pending in *Second* Appellate District.

Transferred to *First* Appellate District.

Dooley v. Johnson, 133 Cal. App. 459.
Pending in *Fourth* Appellate District.
Transferred to *First* Appellate District.
Muller v. John J. Davi & Bro., 131 Cal. App. 156.
Pending in *Third* Appellate District.
Transferred to *First* Appellate District.
McKinney v. Wright, 105 Cal. App. 401.
Pending in *Fourth* Appellate District.
Transferred to *Third* Appellate District.
People v. Frank, 132 Cal. App. 360.
Pending in *Second* Appellate District.
Transferred to *Fourth* Appellate District.
Jenkins v. Board of Civil Service Commissioners, 137 Cal. App. 410.
Pending in *Second* Appellate District.
Transferred to *First* Appellate District.

The foregoing are illustrative only. Many similar cases of transfer from one district to another for hearing and decision could be cited.

Excerpt from the Seventh Report of the Judicial Council of California (Covering Period July 1, 1936, to June 30, 1938)

The following is quoted from page 30 of the above Report:

"It is perhaps well to explain that in the exercise of the power of the Supreme Court to transfer cases from itself to the district courts of appeal and in an endeavor to hold the several districts as nearly as possible in equitable balance, many cases, which would

have been sent to the second appellate district had it been sufficiently manned, have been transferred from the Los Angeles Supreme Court district to the first and third appellate districts and considered and disposed of by those courts; also that since creation of the fourth appellate district court in 1929, practically all appeals to the Supreme Court from the counties within that district, as well as a substantial number originating in the present second appellate district, have been transferred to the fourth appellate district for hearing and determination."